83-1066

No. -

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JACK REILLY'S, INC., D/B/A JACK'S,
PETITIONER,

v.

VIRGINIA THURBER,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

JOHN E. BRADLEY,*
BRUCE G. MCNEILL,
BRADLEY, BARRY & TARLOW, P.C.,
100 Summer Street,
Boston, Massachusetts 02110.
(617) 338-6100

Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the definition of "employer" in Title VII of the Civil Rights Act of 1964 excludes a person who has less than fifteen employees working on "each working day."

Table of Contents.

Table of Authorities Cited.

Cases.

Statutes.

Miscellaneous.

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JACK REILLY'S, INC., D/B/A JACK'S,
PETITIONER,

v.

VIRGINIA THURBER,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

This matter was tried before the United States District Court for the District of Massachusetts and was reported as *Thurber* v. *Jack Reilly's, Inc.*, 521 F. Supp. 238 (D. Mass. 1981).

The petitioner's appeal was heard before the United States Court of Appeals for the First Circuit which affirmed the opinion of the District Court in *Thurber* v. *Jack Reilly's, Inc.*, No. 83-1024, (1st Cir., Sept. 14, 1983), *reh'g denied*, October 14, 1983.

Jurisdiction.

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1), the judgment of the United States Court of Appeals for the First Circuit having been entered on September 14, 1983, and rehearing of said judgment having been denied by the First Circuit on October 14, 1983.

Statutory Provisions Involved.

The jurisdictional provision involved in this matter is § 701(b) of Title VII of the Civil Rights Act of 1964, as amended by Pub. L. 92-261 (1972), 42 U.S.C. § 2000e(b):

> For the purposes of this subchapter —
>
> . . .
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Statement of the Case.

The defendant, Jack Reilly's, Inc., d/b/a Jack's (hereinafter "Jack's"), is a neighborhood bar located in Cambridge, Massachusetts. It is a small business that caters primarily to local college students. During all relevant time periods the business required nine persons to fill all positions necessary for its operation. When its premises were fully occupied these persons would be assigned as follows: one manager or assistant manager, one doorman, three bartenders, one cook and three waitresses. During the time period relevant to this case, September 1, 1973 through December 31, 1976, an average of eight employees worked each day, with a minimum of seven and a maximum of eleven. On no occasion during that period did more than fourteen persons actually work on any given day. The staff was composed mostly of local college students who worked on various rotating shifts during the week, some as little as one shift per week. Consequently, the total tally for weekly payroll purposes might average as high as twenty-six.

In November, 1973, the plaintiff, Virginia Thurber, was hired by Jack's as a waitress. She was assigned to work three weekly nine hour shifts. Approximately one year later Thurber requested that she be assigned to the position of bartender. This request was not granted, nor were additional requests for the same change in work assignment. Consequently, in May, 1975, she terminated her employment at Jack's. She was thereafter unemployed until July, 1976, when she again found employment at a local Cambridge restaurant.

Thurber brought this employment discrimination case on January 4, 1977, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1964), as amended, alleging that she was denied a promotion from waitress to bartender solely on account of her sex. Jack's filed a motion to dismiss on the ground that it did not employ fifteen persons for each

working day in each of twenty or more calendar weeks during the term of Thurber's employment and thus it was not an "employer" as that term is defined in § 701(b) of Title VII, 42 U.S.C. § 2000e(b), and that, consequently, the court had no subject matter jurisdiction over the complaint. The motion was referred for hearing to a magistrate pursuant to 28 U.S.C. § 636(b). A number of affidavits were filed by the parties, and the magistrate, treating the motion as one for summary judgment pursuant to Fed. R. Civ. P. 56, found it to be undisputed that Jack's did not employ sufficient persons to constitute it an "employer" under Title VII, and recommended that the motion be granted. Upon objection by Thurber, the trial judge overruled the magistrate without making any factual findings, and denied the motion on November 21, 1977. Discovery thereafter proceeded. The case was set for trial on May 1, 1981. Jack's moved again for dismissal for lack of subject matter jurisdiction. The motion was denied with the court's ruling that it is the number of employees on the weekly payroll and not those present for work each day that is determinative of subject matter jurisdiction under Title VII. The case was then tried without a jury before Judge Garrity in the District Court for the District of Massachusetts on May 4 and 5, 1981. The trial judge found for the plaintiff and filed a memorandum of decision on August 20, 1981. After a number of hearings on attorney's fees and interest, a final judgment awarding Thurber back pay, attorney's fees and costs was entered on December 14, 1982. On January 7, 1983, Jack's filed a notice of appeal in the United States Court of Appeals for the First Circuit. Briefs were filed and on June 7, 1983, oral argument was heard. On September 14, 1983, a panel of the First Circuit issued its judgment affirming the decision of the District Court. Jack's moved for rehearing en banc which the First Circuit denied on October 14, 1983.

Reasons for Granting the Writ.

I. THE FIRST CIRCUIT'S HOLDING RENDERS SUPERFLUOUS A PORTION OF THE STATUTORY LANGUAGE OF TITLE VII, VIOLATING PRINCIPLES OF STATUTORY CONSTRUCTION AND FAILING TO GIVE EFFECT TO THE STATUTE AS ENACTED.

A. *The First Circuit's Interpretation of the Definition of "Employer" Violates the Elementary Canon of Statutory Construction that Effect Must be Given to Each Word of the Statute.*

By affirming the District Court's holding that the number of "employees" equals the number of persons on the weekly payroll as opposed to the number at work each day, the First Circuit's holding fails to give effect to the phrase "for each working day."

It is a well-settled rule of statutory construction that Congress, in choosing statutory language, must be presumed to have intended to include no superfluous or insignificant words or phrases. It follows, therefore, that courts must "give effect, if possible, to every clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882). *Accord*, *Reiter* v. *Sonotone Corporation*, 442 U.S. 330, 339 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955). See 2A J. Sutherland, Statutes and Statutory Construction § 46.06 at 63 (C. Sands ed. 1973). The First Circuit's interpretation fails to give effect to the phrase "for each working day" because that phrase requires consideration of daily, as well as weekly, employment, which the First Circuit's payroll test ignores. It was clearly possible for the First Circuit to give effect to this phrase by interpreting the number of employees as that number which is at work each day. The phrase "for each working day" plays no role, however, in the payroll test, and is therefore

rendered entirely superfluous. Such an interpretation violates the elementary principle of statutory construction that no word or phrase be rendered superfluous, and should not be allowed to stand.

B. *The First Circuit's Payroll Test Fails to Give Effect to the Plain Language of § 701(b), Which Language was Carefully Chosen by Congress as a Compromise and Which Therefore Deserves an Especially Literal Reading.*

In order to fall within the jurisdiction of Title VII, a business must have "fifteen or more employees for each working day . . . ." This plain language itself requires determining on a daily basis the number of persons that a business employs. The general requirement that statutory language be given a literal interpretation applies *a fortiori* to Title VII. This Court has held that the history of the statute dictates that it be interpreted strictly and literally.

> It is unquestionably true that the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices, and that that basic policy must inform construction of this remedial legislation. It must also be recognized, however, in light of the tempestuous legislative proceedings that produced the Act, that the ultimate product reflects other, perhaps countervailing, purposes that some Members of Congress sought to achieve. *The present language was clearly the result of a compromise. It is our task to give effect to the statute as enacted.* See *Toussie* v. *United States*, 397 U.S. 112, 123-124 [1969].

Mohasco Corporation v. *Silver*, 447 U.S. 807, 818-819 (1980) (emphasis supplied) (footnotes omitted). Therefore, the First

Circuit was clearly in error in freely interpreting the definition of employer to require a weekly payroll test. Such a test ignores the phrase "for each working day" and does not "give effect to the statute as enacted." *Id.* The clarity of this mistaken interpretation of the statute may be readily grasped by deleting this phrase from the statute. Thus amended it clearly establishes the jurisdictional basis to be the weekly payroll test decreed by the First Circuit.

The insertion in the definition of employer of the phrase "for each working day" by the Senate and the ensuing 500 hours of exhausting debate, indicate Congress' concern over the jurisdictional reach of Title VII. That the statute was phased in gradually to businesses employing fewer and fewer persons demonstrates that Congress clearly did not intend that it apply to all businesses. Moreover, Congress directed explicit attention to the types of business to which Title VII would apply! Senator Hubert H. Humphrey, with reference to the employee limit in the definition of "employer," reasoned that the definition comprehended exclusively those businesses which generated "some reasonable degree of gross product in terms of income or output or salaries or goods or services" and which lacked "intimate, personal character . . .." 110 Cong. Rec. 13088 (1964). The small businesses to which the First Circuit has expanded the definition of "employer" and thus the jurisdiction of Title VII are precisely those businesses which Congress intended to exclude from the scope of Title VII.

Congress' concern was not with the aggregate number of persons to which a business issued a paycheck each week, but rather to its size, or, in other words, the number of jobs or positions that a business needs in order to operate. A business, such as Jack's, which has only nine work positions to fill does not contribute any more to the gross national product by issuing paychecks to twenty-six part-time persons than by issuing them to nine full-time persons. Businesses that have fewer

than fifteen employment positions have little, if any, impact on matters of interest to the federal government, and, accordingly, Congress did not intend to include them within the jurisdiction of a federal statute prohibiting employment discrimination.

Furthermore, in order to prevent employers from adopting employment practices designed to allow them to escape inclusion in the jurisdiction of Title VII, the First Circuit's payroll test must not be allowed to stand. On the basis of that test, businesses which issue weekly paychecks to fifteen or more employees, but which operate with fewer than fifteen employees at work for each working day, can escape the jurisdiction of Title VII simply by discharging part-time help and employing only the number of persons required to fill their operating positions. In addition, persons who are starting or expanding small businesses will be induced to hire and put on their payrolls fewer than fifteen employees, requiring each to work an extraordinary number of hours per week, as opposed to hiring more than fifteen employees and allowing each to work a reasonable number of hours per week.

For example, if Jack's had had the benefit of the First Circuit's decision several years ago, it might have replaced its part-time personnel, retaining only nine full-time waitresses, bartenders and doormen and requiring each of them to work every shift, every day. Indeed, the plaintiff conceded before the magistrate that had Jack's simply filled its operational positions with the full-time personnel, it would not have been within the definition of "employer." See Magistrate's Report and Recommendation on Motion to Dismiss at 7, n.3 (page 8a, *infra*). Such employment practices would not only be harsh, but would be irrational from a business standpoint. It strains credulity to posit that Congress, in enacting a statute to reduce or eliminate discrimination in the workplace, would have intended that it be interpreted in such a way as to create an incentive for employers to discharge persons whom they otherwise

would have kept in their employ or fail to hire persons whom they otherwise would have hired. Businesses should not be permitted, as they would be under the First Circuit's payroll test, to move themselves in or out of the jurisdiction of Title VII by the employment practices they choose to adopt or by the number of weekly paychecks they choose to issue. Such an incentive would not exist if it were decided that the relevant number of employees was that number which reported to work each day because employers could not reduce the number of employees that report to work each day below the minimum necessary for the operation of the business. The First Circuit's attention to the question of including part-time employees in the weekly payroll count is simply not relevant to the jurisdictional issue raised by this case. Jack's does not dispute the inclusion of part-time persons in the *daily* tally. It is the cumulative inclusion of occasional part-time employees, some of whom worked only one shift per week, in a *weekly* total, without regard to the undisputed fact that only eight employees were present for duty on an average day and never more than fourteen on any working day, to which Jack's objects.

II. The First Circuit's Holding will Greatly Increase the Amount of Civil Litigation in the Federal Court System.

A. *The First Circuit's Interpretation Expands the Jurisdiction of Title VII to Small Businesses that were Not Intended by Congress to be Within its Jurisdiction.*

The First Circuit's interpretation of the definition of "employer" brings within the jurisdiction of Title VII every business that has fifteen or more persons on its weekly payroll record for the requisite number of weeks, regardless of how few employees report to work for each working day and regardless of how infrequently the persons listed on the weekly payroll

report to work. This interpretation will subject to litigation small businesses that Congress, by its carefully chosen language, intended to exempt from the jurisdiction of Title VII. The significance of this consequence is potentially profound. Of approximately five million businesses in the United States, over four million have fewer than fifteen employees. Dun's Census of American Business 26 (Dun and Bradstreet 1983) (Appendix G). The expansiveness of the First Circuit's interpretation of "employer" will doubtlessly subject many of these businesses to actions in federal court for violations of Title VII. The First Circuit's statement that its jurisdictional decision "might sweep into the ambit of the statute a few truly 'Mom and Pop' stores . . ." will very likely prove to be a massive understatement.

B. *The First Circuit's Interpretation Unnecessarily Blurs the Jurisdictional Threshold of Title VII, Inviting Litigation Against Small Businesses that are Near, but Not Within the Jurisdiction of Title VII.*

The First Circuit's holding has so blurred the jurisdictional threshold of Title VII that businesses which have approximately fifteen employees on their weekly payrolls or approximately fifteen employees that report to work each day cannot be certain whether they are within the jurisdiction of Title VII. The payroll test leaves open the question of whether counting the number of employees on a customary weekly payroll is sufficient or whether a determination must be made of the number of employees on the payroll for each day of the requisite number of weeks. Furthermore, the First Circuit's payroll test does not address the issue of whether independent contractors or "occasional part-time employees," see *Takeall* v. *Werd, Inc.*, 23 F.E.P. 947 (M.D. Fla. 1979), are to be included among employees on the payroll.

The definition of employer in Title VII determines whether federal courts presented with Title VII actions have subject matter jurisdiction over them. The definition should not be ambiguous, as subject matter jurisdiction represents the court's very power to apply the statute to a particular business. Consequently, the jurisdictional line should be precise.

The confusion created by the First Circuit will result in litigation against businesses which are near, but not within, the jurisdiction of Title VII. Such litigation will arguably be dismissed when such employers demonstrate that they do not have fifteen or more employees on their payrolls, but it will nevertheless crowd federal dockets and result in expense to businesses forced to defend against such litigation.

Furthermore, an ambiguous jurisdictional line will induce businesses, as alluded to earlier, to reduce the number of paychecks they issue to below fifteen by discharging part-time personnel and retaining the minimum number of persons necessary to operate. If the First Circuit's test is allowed to stand, the number of paychecks that a business issues, as opposed to its size, will determine whether it is within the jurisdiction of Title VII.

Finally, an ambiguous jurisdictional line is contrary to the intent of Congress to provide a brightline definition of "employer." When the Senate inserted the phrase "for each working day" in the definition of "employer," Senator Everett Dirksen, one of its proponents, stated that "the definition of 'employer' is amended to provide a specific test for computing the number of employees of an employer, in determining whether the employer is covered by the bill." 110 Cong. Rec. 12818 (1964). Senator Humphrey, another proponent, stated that "the definition of 'employer' has been clarified to provide needed certainty as to coverage of employers where the number of employees fluctuates above and below the figure requisite to application of the title." *Id.* at 12722. The First Circuit's payroll test clearly controverts this intent.

Conclusion.

The petitioner respectfully requests that this Court grant a writ of certiorari in this matter.

Respectfully submitted,

JOHN E. BRADLEY,*
BRUCE G. McNEILL,
BRADLEY, BARRY & TARLOW, P.C.,
100 Summer Street,
Boston, Massachusetts 02110.
(617) 338-6100

Counsel of Record

APPENDIX.

Appendix A.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
77-33-G

DOCKETED

VIRGINIA THURBER,
Plaintiff

v.

JACK REILLY'S INC., d/b/a JACKS,
Defendant

REPORT AND RECOMMENDATION ON MOTION TO DISMISS

September 13, 1977

COHEN, M.

In her complaint, plaintiff alleges that in the Fall of 1974, defendant Jacks, a bar and restaurant located in Cambridge, refused to promote her status to that of a bartender solely on account of her sex. Jurisdiction is founded on the provisions of Title VII of the Civil Rights Act (42 U.S.C. 2000e et seq.).

On February 7, 1977, defendant filed a motion to dismiss on the grounds that the Complaint failed to state a claim upon which relief may be granted, and that the Court lacked subject matter jurisdiction. The motion was referred to this court for report and recommendation.

At the initial hearing before this court, it appeared that to the extent that defendant contended that the court lacked subject matter jurisdiction, defendant relied upon affidavits extraneous to the Complaint. Accordingly, this court, pursuant to the provisions of Rule 12(c), F. R. Civ. P., treated the motion as one for summary judgment under Rule 56, F. R. Civ. P., and continued the hearing in order to give plaintiff an opportunity to file counter-affidavits. Such affidavits were filed, and further hearing were held on April 20, 1977, and August 30, 1977.

1. Insofar as defendant contends that the Complaint fails to state a claim upon which relief may be granted, a fair reading of the Complaint shows that plaintiff has alleged facts which, if believed, satisfies each and every element of a cause of action for sex discrimination under the provisions of 42 U.S.C. 2000e et seq. At the hearings before this court, defendant has conceded as much, but has concentrated on the argument that the Court lacked subject matter jurisdiction. Accordingly, this court recommends that the Court deny the motion to dismiss insofar as that motion relies upon the ground that the Complaint fails to state a claim upon which relief may be granted.

2. In arguing that this Court lacks subject matter jurisdiction, defendant contends that he is not an "employer" within the meaning of 42 U.S.C. 2000e. Under the provisions of 42 U.S.C. 2000e(b), an "employer" is defined, in pertinent part, as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . .

As against this definition of an employer, defendant contends it is not engaged in an industry affecting commerce, and that, during the relevant time period, it did not have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. These points are discussed seriatim.

A. Under the provisions of 42 U.S.C. 2000e(h), the term "industry affecting commerce is defined as follows:

> (h) The term "industry affecting commerce" means any activity, business, or industry *in commerce* or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity. (Emphasis added).

The term "commerce," in turn, is defined by 42 U.S.C. 2000e(g). It provides:

> (g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

On the basis of the affidavits filed, the undisputed evidence shows that the defendant was and is a restaurant and lounge which purchased, on a regular basis, quantities of foodstuff and liquor which was produced and/or distilled outside the

Commonwealth of Massachusetts. In these circumstances, it is clear that the defendant was engaged in an activity "in commerce" within the meaning of 42 U.S.C. 2000e, and this court recommends that the Court deny defendant's motion for summary judgment based upon this ground.

B. The question remains, however, as to whether defendant meets the second aspect of the definition of an "employer" — i.e., whether the defendant, during the relevant period of time, had "fifteen or more employees *for each working day* in each of twenty or more calendar weeks. . ." (Emphasis added). On this score, this court finds the following facts to be undisputed:

a) During the relevant time period,[1] the defendant carried on its weekly payroll records an average of 26 employees.

b) Of these 26 employees, most were local college atudents who worked on a part-time basis, were paid on an hourly basis, and who did not receive fringe or vacation benefits.

c) On no occasion during the period September 1, 1973, through December 31, 1976, did more than 14 persons actually work at defendant's establishment on any given day. During that period, an average of 8 employees worked each day, with a minimum of 7, and a maximum of 11 employees, per day.

Against these facts, plaintiff contends that the relevant test refers to ". . . persons on the payroll and regularly employed, not to the number of people at work on any given day." (Plaintiff's Memorandum in Opposition to Summary Judgment, p. 3). Applying this test, plaintiff suggests that there was an average of 26 persons per week on the defendant's payroll, and thus, that defendant was an "employer" within the meaning of 42 U.S.C. 2000e.

---

[1] Inasmuch as plaintiff alleges the discrimination occurred in 1974, the relevant time period would be the calendar years 1973 and 1974.

The difficulty with plaintiff's argument, however, is that it is inconsistent with accepted notions of statutory construction. Under settled principles, it must be presumed that Congress, in choosing the language used, intended no superfluous or insignificant words or phrases. Thus, a court, in construing a statute, is dutibound "to give effect, if possible, to every clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955). If Congress had intended the construction urged by the plaintiff — i.e., that the number of persons on an employer's weekly payroll is determinative — then it could have very simply achieved that result by simply eliminating the phrase "for each working day." Thus eliminated, the statute would have read:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees in each of twenty or more calendar weeks. . .

It is clear that the statute, if written as set forth above, would be unambiguously consistent with plaintiff's construction which looks to the number of employees on each weekly payroll record.

But Congress did not so write the statute. It, instead, interjected the phrase "for each working day." This court must construe that phrase with a view towards giving it effect and meaning. In context, it is clear that Congress, by including the phrase "for each working day," intended that the provisions of 42 U.S.C. 2000e et seq. apply only to those persons who had 15 or more persons at work each given day in each of 20 or more calendar weeks. Indeed, no other reasonable alternative construction obtains. In these circumstances — absent controlling or persuasive precedent to the contrary — this

court concludes that, under the provisions of 42 U.S.C. 2000e, a person is not an "employer" unless he has 15 or more persons at work each day for 20 or more calendar weeks.

In arguing to the contrary, plaintiff points to the decision of *Pascutoi* v. *Washburn-McReary Mortuary*, 11 FEP 1325, No. 4-75 Civil 110 (D. Minn. July 3, 1975), the only reported case dealing with the interpretation at issue. In that case, Judge Larsen relied exclusively on two opinions by the EEOC General Counsel issued on October 18 and October 20, 1966, which indicated that the critical test is the number of persons on the payroll during the relevant 20 week periods, not how many are at work on a given day, and that, in applying the test, regular part-time and seasonal employees should be counted even though they do not work on each working day of the period. On the basis of these opinions, which he perceived to be a contemporaneous and practical interpretation of the statute by executive officers charged with its administration, Judge Larson concluded that the statute should be construed consistent with the interpretation promulgated by EEOC.

In the circumstances, this court cannot join in the conclusion reached by Judge Larson. To be sure, it is well-established that a long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement constitutes an invaluable aid in the construction of a doubtful statute. But that rule is inapplicable to the present case, since — and obviously not brought to the attention of Judge Larson — the interpretations issued by EEOC General Counsel were informal and not intended to be an official agency interpretation.

Under the provisions of 29 C.F.R. 1601.28-1601.30, General Counsel for EEOC has limited authority to issue interpretive opinions in the form of "opinion letters" issued on behalf of the Commission. Those "opinion letters," however, were not intended to be of general application. In 1970, it became

apparent to the EEOC that commercial reporting services were citing such "opinion letters" or "General Counsel Opinions" as authoritative interpretations of the provisions of Title VII. In order to rectify this misinterpretation of the authority of General Counsel, the Chairman of the EEOC published a regulation in the Federal Register (35 F.R. 18692, December 8, 1970). That regulation provided, inter alia:

> . . . Matter issued pursuant to 29 CFR 1601.30(a) is issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s) . . . Similarly, matter appearing in the commercial reporting services erroneously entitled, "opinion letter" or "General Counsel Opinion" do not meet the standard required of a "written interpretation or opinion of the Commission" within the meaning of the Commission's Procedural Regulations, 29 CFR 1601.28-1601.30, or Section 713(b), 42 U.S.C. Section 2000e-12(b).

Thus, at the time Judge Larson relied upon the General Counsel Opinions cited[2] in his decisions, the Chairman of the EEOC had specifically disclaimed that those opinions were official agency interpretations of the provisions of 42 U.S.C. 2000e.

---

[2] Prior to rehearing, this court ordered that the plaintiff file copies of those opinions with this court. At the rehearing, counsel for plaintiff indicated that EEOC was unable to furnish her with copies of those opinions. Counsel for plaintiff further advised that she had communicated with Judge Larson, who advised that he had never actually received copies of those opinions. In view of the regulation set forth above (35 F.R. 18692), the unavailability of such copies is not surprising.

In short, giving each word its due effect, the plain meaning[3] of 42 U.S.C. 2000e(b) clearly indicates that, in order to qualify as an "employer" under the Act, an employer must have 15 or more persons at work for each working day for 20 or more calendar weeks. The rule of contemporary administrative interpretation is not applicable, since there has been no official interpretation issued by the EEOC. The undisputed evidence shows that the defendant did not have 15 or more persons at work for each working day for 20 or more calendar weeks. This court accordingly recommends that the Court allow defendant's motion for summary judgment.

/s/_____
UNITED STATES MAGISTRATE

---

[3] Of course, the "plain meaning" of a statute might not control if its obvious effect was to defeat relevant legislative intent. But that is not the case. Congress — in its judgment — excepted application of the Act to a certain class — i.e., employers who had 14 or less employees working each day. It is clear from all the undisputed evidence before this court that defendant's business was one which, on a day-to-day basis, used an average of 8 employees, and a maximum of 11. If defendant had simply used the same employees on each working day, plaintiff concedes that defendant would not have been covered by the Act. It is therefore inconceivable to assume that Congress intended the Act to apply to defendant, simply because defendant chose to spread the work force out in such a manner as to give local college students some extra pocket money.

Appendix B.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 77-33-G

DOCKETED

VIRGINIA THURBER,
Plaintiff

v.

JACK REILLY'S, INC., d/b/a JACKS,
Defendant

SUPPLEMENTAL REPORT AND RECOMMENDATION

September 14, 1977

COHEN, M.

After completion of the original Report and Recommendation dated September 13, 1977, this court received Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment[1] in which plaintiff urged that, even if the opinions of General Counsel of the EEOC were informal and unauthorized, nevertheless this court should give due deference to those opinions.

---

[1] The Supplemental Memorandum was docketed on September 9, 1977, but was not forwarded to this court until after the file was returned to the Clerk with the original Report and Recommendation.

To be sure, under certain circumstances, a court may give deference to informal administrative rulings issued by an administrative agency. See, e.g., *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). But as plaintiff recognizes in her Supplemental Memorandum, the weight to be accorded to such informal rulings varies in accordance with several factors including, but not limited to:

1. The thoroughness evident in its consideration before reaching a decision;
2. The validity of the reasoning which underlies the informal ruling;
3. The special expertise of the agency combined with the lack of the Court's expertise;
4. Re-enactment of the statute in circumstances which indicate legislative approval of the rule;
5. Contemporaneous by the administrator who may have been especially informed of the legislature's intent; and
6. The duration of the ruling.

Considering these factors, it is clear that no weight should be given the opinions at issue. Inasmuch as General Counsel for EEOC has chosen not to make available to this court a copy of the informal opinions at issue, this court has no means by which to assess whether or not there was thorough consideration of the issues by General Counsel, or to assess the validity of the reasoning used by General Counsel in reaching the conclusion which he did.

The question here in issue involves one of statutory construction — nothing more, nothing less. Inasmuch as there has been — and cannot be — any showing that General Counsel participated in the legislative formulation of Title VII, there is

no reason to believe that General Counsel — despite his expertise in other areas — is in any better position to construe the phrase "for each working day" than the Court itself.

Despite plaintiff's suggestion to the contrary, there has been no showing that subsequent re-enactments of Title VII reflected legislative approval of the informal opinion issued by General Counsel, for the simple and obvious reason that there has been no showing whatsoever that Congress has ever been made aware of those decisions.

Although General Counsel's opinions were issued shortly after Title VII became operative, there has been no showing that General Counsel, or, for that matter, anyone else employed by EEOC, was "especially informed" of the legislature's intent.

Finally, the informal opinion was short in duration, inasmuch as the Chairman of the EEOC publicly disclaimed that the opinions were official interpretations of that Agency just four years later.

In short, although informal administrative rulings may be given some weight under certain circumstances, this is not that case. The informal opinions lacked all the attributes which would contribute to the authoritative weight of such informal opinions. The Chairman of EEOC specifically disclaimed those opinions as those of EEOC. Given the plain meaning of the words of 42 U.S.C. 2000e(b) — a meaning fully consistent with relevant legislative intent — it would be a drastic departure from accepted canons of statutory construction to accept the construction urged by plaintiff, simply because General Counsel of EEOC, on the basis of reasoning not yet made known to this court, chose to ignore the plain meaning of the statute, and substitute his own concept of the scope of power entrusted to EEOC as well as this Court.

This court accordingly reaffirms its earlier Report and Recommendation, and recommends that the Court allow defendant's motion for summary judgment for the reasons stated.

/s/_____
UNITED STATES MAGISTRATE

Appendix C.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

VIRGINIA THURBER, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	NO. 77-33-G
	)	DOCKETED
JACK REILLY'S INC., Defendant.	)	

MEMORANDUM OF DECISION
August 20, 1981

GARRITY, J.

Plaintiff Virginia Thurber brought this action against Jack Reilly's Inc., (hereafter Jack's) alleging discrimination against her on the basis of gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under the Massachusetts antidiscrimination statute, M.G.L. c. 151B. Defendant is an employer within the meaning of Title VII, and all jurisdictional requirements have been met. Jurisdiction over this actioin is therefore proper under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1343. We have pendent jurisdiction over the state law claim.

At the conclusion of the non-jury trial of this case on May 5, 1981, the court entered findings of fact and conclusions of law in favor of the plaintiff as to the liability issues raised by this litigation and made preliminary findings as to damages, but, on defendant's motion, reserved the final determination of damages pending the submission of the plaintiff's tax returns

for the years in question. We have been informed by defendant's counsel that the returns have been received and that they confirm plaintiff's trial testimony to the effect that she had no income during the period from May 31, 1975 through July 1, 1976. Therefore, the damage issue is now ripe for decision.

At the trial of this action, plaintiff established that she was first employed as a waitress at Jack's for approximately two weeks in November, 1972, and that she voluntarily terminated her employment there at that time. She was rehired as a waitress at Jack'sgbeginning in November, 1973, with the understanding that she had had bartending experience and would be interested in applying for any bartending positions which became available. During the subsequent period, plaintiff satisfactorily performed her responsibilities as a waitress.

On or about the second week in November, 1974, and several times thereafter, Thurber requested Jack's management to promote her to bartenders' positions which became available periodically. Despite the defendant's manager's knowledge of Thurber's desire to be employed as a bartender, her previous work experience in that capacity, and her job seniority, the defendant refused to promote her to the position of bartender trainee, and consistently hired only males for these positions. As we stated in our findings in open court at the end of the trial in this case, by failing to promote the plaintiff despite her job qualifications, due to her sex, the defendant, through its agents, intentionally discriminated against her on the basis of her gender, in violation of her rights under Title VII and M.G.L. c. 151B. Finally, on or about May 31, 1975, in retaliation for her continued insistence on a promotion, Jack's managers constructively discharged Thurber by reducing her work schedule from three shifts per week to one, effectively cutting her wages by two-thirds. The plaintiff left her employment at Jack's at that time.

During the period following her constructive discharge on May 31, 1975, Thurber attempted to locate work. She eventually obtained employment as a full-time bartender at the Harvest Restaurant in Cambridge on July 1, 1976, where she continued to be employed until January, 1977, when she was laid off due to a drop in business.

We turn now to the finding of fact and conclusions of law with respect to damages. We note, preliminarily, that under the circumstances of this case, the same issues are presented with respect to the state anti-discrimination statute and Title VII.[1] We note, too, that the plaintiff's damages can be divided into two categories: those sustained during the period after she demanded a promotion but before she was constructively discharged (from mid-November, 1974 until May 31, 1975), and those sustained during the period of her unemployment (from May 31, 1975 through July 1, 1976).

We turn first to the amount recoverable by the plaintiff for the period that she remained employed at Jack's, after her mid-November request for a promotion. During this period, Thurber sustained economic loss entitling her to back pay, which shall be computed as the gross amount, including wages and gratuitities, that the plaintiff would have earned had she been employed at Jack's as a bartender.

At the conclusion of the trial, we made the following preliminary findings of fact with respect to damages sustained by the plaintiff while she continued to work at Jack's.

(1) The plaintiff sustained no economic loss for the eight-week period she would have spent as a bartender trainee.

---

[1] In addition to back pay, which is recoverable under both statutes, plaintiff originally sought an award of damages beyond back pay under the state statute, citing *Bournewood Hospital Inc. v. Massachusetts Commission Against Discrimination*, 1976, 371 Mass. 303. However, plaintiff has withdrawn her request for damages beyond those available under Title VII.

(2) The period for which plaintiff is entitled to damages is to be measured from the time of her first request for a promotion which should have been granted, in mid-November, 1974, until her constructive discharge on or about May 31, 1975 — a period of twenty weeks.

(3) The plaintiff worked an average of three 9-hour shifts, or 27 hours, per week, and she would have continued to work the same number of hours had she been promoted to bartender.

(4) During the 1974-75 period, a waitress' salary was $1.20/hour and that of a bartender was $3.00/hour, the salary differential being $1.80/hour.

(5) On the average, an experienced bartender earned $50 in tips per shift, and plaintiff earned an average of $35 per shift in tips, the differential in gratuities being $15 per shift.

Based on these findings of fact, which we reaffirm, we conclude that plaintiff would have earned $972 more in salary, and $900 more in gratuities, had she been employed as a bartender during the period following the discriminatory denial of her request for a promotion. Therefore, the back pay award for this period is $1,872.

The defendant argues that the plaintiff is not entitled to any damages for the period following her constructive discharge because she failed to carry the burden of demonstrating that she attempted to mitigate damages by seeking other employment. We disagree. It is well established that the willful loss of earnings is an affirmative defense, and the burden of proving it rests with the employer. *EEOC* v. *Kallir, Philips, Ross, Inc.*, S.D. N.Y., 1976, 420 F.Supp. 919, 924, aff'd, 2 Cir., 1977, 559 F.2d 1203; *Kaplan* v. *Theatrical Employees Local 659*, 9 Cir., 1975, 525 F.2d 1354, 1363; *Sprogis* v. *United Air Lines, Inc.*, 7 Cir., 1975, 517 F.2d 387, 392. To fulfill this burden, the defendant must show more than that there were

further actions that plaintiff could have taken in pursuit of employment. Rather, the defendant must show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of doubt in assessing her conduct. *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F.Supp. at 925. The conduct which will bar recovery of back pay under the National Labor Relations Act, upon which the back pay provisions of Title VII were modeled, *Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 419 n. 11, has been characterized as "a clearly unjustifiable refusal to take desirable new employment" or "a willful loss of earnings," *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 199-200; *NLRB* v. *Arduini Mfg. Corp.*, 1 Cir., 1968, 394 F.2d 420, 423; *NLRB* v. *Cashman Auto Co.*, 1 Cir., 1955, 223 F.2d 832.

The defendant has completely failed to carry its burden of showing failure to mitigate. Plaintiff used various means in an unsuccessful effort to locate employment, including listings with the state unemployment agency, bulletin boards and personal contacts. She did not limit her search to any particular kind of employment, but sought jobs as a waitress, bartender, and clerical worker. She made frequent applications for employment and never turned down an offer of employment. Therefore, plaintiff is entitled to recover for the period of her unemployment.

The amount recoverable by Thurber for her period of unemployment raises another legal question. Plaintiff claims that she is entitled to a back pay award representing the full bartender's salary ($3.00 per hour) plus gratuities ($50 per shift), assuming a 27 hour work week, for the 60 week period of her unemployment, for an award of $13,860 for this period. If added to the pre-discharge damages of $1,872, the total award would be $15,732. The defendant argues that the

plaintiff's award must be reduced by the amount of unemployment compensation and food stamps she deducted during this period.

The courts are split concerning whether unemployment compensation should be deducted from a recovery of back pay under Title VII. The cases holding that state unemployment compensation should not be deducted reason that such payments are made to pursue an independent social policy, and that an employer guilty of discrimination should not obtain the benefits of that policy. *Abron* v. *Black & Decker Mfg. Co.*, D. Md., 1977, 439 F.Supp. 1095, 1115; *Tidwell* v. *American Oil Co.*, D. Utah, 1971, 332 F.Supp. 424; see also *NLRB* v. *Gullett Gin Co.*, 1950, 340 U.S. 361, 364 (holding that state unemployment payments are not deductible from a backpay award under the National Labor Relations Act). Several courts, however, have held that these payments are deductible. *EEOC* v. *Steamfitters Local 638*, 2 Cir., 1976, 542 F.2d 579, 591-92; *Satty* v. *Nashville Gas Co.*, 6 Cir., 1975, 522 F.2d 850, 855, petition for cert. filed 44 U.S.L.W. 3254 (U.S. Oct. 28, 1975). *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F.Supp. at 925, aff'd 2d Cir., 1977, 559 F.2d 1203. This view is based on the notion that "[t]he back pay award is not punitive in nature, but equitable — designed to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination," *Robinson* v. *Lorillard Corp.*, 4 Cir., 444 F.2d 791 at 802, petition for cert. dismissed, 404 U.S. 1006 (1971), and that, therefore, "there is no compelling reason for providing the injured party with double recovery for his lost employment." *EEOC* v. *Steamfitters Local 638*, *supra* at 592.

Under the particular circumstances of this case, we conclude that the amount that Thurber received in unemployment benefits should be deducted from her award. The more recent Court of Appeals decisions, cited above, have upheld

deductions of this sort. Also, equitable considerations militate in favor of a reduction of the gross back pay award here. The unemployment compensation paid to the plaintiff is not recoverable from her by the commonwealth under M.G.L. c. 151A, § 69, and, since Thurber remained unemployed for a relatively long period of time, the amount involved is not insubstantial. In our opinion, under these circumstances a double recovery is not necessary to make plaintiff whole for the injury she sustained due to defendant's discriminatory actions. For the same reasons, the amount plaintiff received in food stamps during her period of unemployment shall be deducted from her back pay award.[2]

With this reduction, the damages recoverable by the plaintiff as back pay are $13,675. Since prevailing plaintiffs in Title VII actions are entitled to a reasonable rate of interest on an award of back pay in order to compensate them for the loss of the use of the money during the back pay period, *Chastang* v. *Flynn & Emrich Co.*, D. Md., 1974, 381 F.Supp. 1348, aff'd 541 F.2d 1040 (4 Cir. 1976); *Howard* v. *Ward County*, D. N.D., 1976, 418 F.Supp. 494, 506; *DiSalvo* v. *Chamber of Commerce*, W.D. Mo., 1976, 416 F.Supp. 844, modified, 568 F.2d 593 (8 Cir., 1978), Thurber shall be awarded prejudgment interest in the amount of eight per cent per annum measured from the dates on which she should have received her bartender's wages.[3]

---

[2] Plaintiff testified that she received $23 per week in unemployment compensation for all but one of the sixty weeks that she was unemployed, for a total of $1,357. In addition, she received $700 in food stamps during this period. The total deduction is therefore $2,057.

[3] Counsel shall endeavor to stipulate this amount of interest. A first draft of such a computation shall be prepared by plaintiff's counsel and presented to defense counsel within two weeks of the date of this memorandum of decision. If the parties are unable to agree, they shall submit their disagreement to Deputy Clerk Moynahan.

The plaintiff having prevailed, she is, under the circumstances of this case, entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k). On July 27, 1981, plaintiff's counsel submitted a detailed application for attorneys' fees and costs, accompanied by a supporting affidavit. Counsel for the plaintiff and defendant are to confer and attempt to reach a stipulation on the amount of attorney's fees recoverable by the plaintiff. If such stipulation is not reached, defendant shall file an opposition to plaintiff's counsel's petition, accompanied by a supporting memorandum, within ten days of the date of this order, and plaintiff shall file its response thereto, if any, within seven (7) days thereafter. It is further ordered that plaintiff's counsel submit a form of judgment in conformity with the rulings set forth in this opinion within 20 days.

W. Arthur Garrity Jr.
United States District Judge

Appendix D.

United States Court of Appeals for the First Circuit

No. 83-1024

VIRGINIA THURBER,
PLAINTIFF, APPELLEE,

v.

JACK REILLY'S, INC., d/b/a JACK'S,
DEFENDANT, APPELLANT.

JUDGMENT

Entered September 14, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

Appendix E.

United States Court of Appeals for the First Circuit

No. 83-1024

VIRGINIA THURBER,
PLAINTIFF, APPELLEE,

v.

JACK REILLY'S, INC., d/b/a JACK'S,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. W. Arthur Garrity, Jr., *U.S. District Judge*]

Before
Coffin and Breyer, *Circuit Judges*,
and Skinner,* *District Judge*.

Bruce McNeill, with whom *Bradley, Barry & Tarlow, P.C.*, was on brief, for appellant.

---

*Of the District of Massachusetts, sitting by designation.

Philip M. Weinberg, with whom *Geller & Weinberg* was on brief, for appellee.

September 14, 1983

SKINNER, *District Judge*. This appeal from the district court's denial of the defendant's motion to dismiss and final judgment for the plaintiff presents the sole issue of the proper interpretation of the definition of employer under Title VII, 42 U.S.C. § 2000e(b).

Plaintiff Thurber began working in November, 1973 as a waitress at a bar and restaurant known as "Jack's" operated by the defendant. Sometime in 1974 she applied for a higher paying position as a bartender. Jack's followed a practice of hiring only males as bartenders, however, and refused to train her for the position. Thurber thereafter complained that Jack's was discriminating against her. In response to her complaints, Jack's reduced her scheduled working hours by two-thirds. She quit her job in May, 1975.

Thurber filed a complaint in the United States District Court in which she alleged that Jack's discriminated against her on the basis of her sex in violation of Title VII, 42 U.S.C. § 2000e. She subsequently amended her complaint to add a count under Mass. Gen. Laws c. 151B, the Massachusetts discrimination in employment statute.

Jack's brought a motion to dismiss the complaint for lack of subject matter jurisdiction, contending that it was not an employer as defined by § 2000e(b) because it did not have the requisite number of employees. 42 U.S.C. § 2000e(b) provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . .

Civil Rights Act of 1964, § 701(b), 78 Stat. 260, as amended 86 Stat. 104-105 (1972), 42 U.S.C. § 2000e(b) (1976). Jack's is a small bar in Cambridge, Massachusetts which operates by having approximately 9 employees report to work each day. Some of these employees work full time; most, however, work part time. In order to remain open 7 days a week, Jack's maintained more than 15 employees on the payroll for more than 20 weeks during the relevant time although no more than 11 employees ever reported for work on any one day.

The magistrate interpreted § 2000e(b) as requiring that a business have 15 or more employees who reported to work for each working day and recommended that the motion to dismiss be allowed. The district court rejected that recommendation, and denied the motion to dismiss on the basis that the number of employees should be determined by examining the payroll and not by counting the number of employees who report to work. After a bench trial, the court entered judgment for the plaintiff.

Every court which has addressed the issue has held that regular part-time employees are employees within the meaning of § 2000e(b). *E.g.*, *Pedreyra* v. *Cornell Prescription Pharmacies*, 465 F.Supp. 936, 941 (D. Colo. 1979); *Hornick* v. *Borough of Durvea*, 507 F. Supp. 1091, 1097 (M.D. Pa. 1980); *cf. Pascutoi* v. *Washburn-McReavy Mortuary*, 11 F.E.P. 1325, 1327 (D. Minn. 1975); *see Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980), *see also* 2 Larson, *Employment Discrimination*, § 5.32, (Matthew Bender &

Co. 1973). The appellant has cited no authority to the contrary. The part-time employees excluded by the court in *Takeall* v. *Werd, Inc.*, 23 F.E.P. 947, 948 (M.D. Fla. 1979) were occasional help, hired only to fill in for isolated vacation days of the regular employees.

Appellant relies only on its unsupported assertion that the insertion of the words "for each working day" in the statute necessarily imports a Congressional intent to restrict application of the statute to employers who had 15 or more employees actually at work on each working day in each of 20 or more calendar weeks. While Congressional debate on enactment of Title VII revealed concern for the over-regulation of small family or neighborhood businesses, the legislative history generally weighs heavily against the appellant's position.

For instance, Senator Dirksen, a co-sponsor of Title VII, stated that the definition of "employer" in Title VII was borrowed from the Unemployment Compensation Act (26 U.S.C. § 3304 (1954)). 110 Cong. Rec. 13087 (1964). Under Rev. Rule 55-19, Regulation 107, § 403.205 (1955) an employee is to be counted under the Unemployment Compensation Act for each day that an employment relationship exists regardless of whether the employee reported to work each day. This ruling had been in force for nine years prior to the enactment of Title VII. Title VII was considered a generally remedial statute, and the prevailing majority in Congress intended to give it broad effect. Comments of Senators Morse, Saltonstall and others, 110 Cong. Rec. 13087-13093.

In 1972, the statutory definition of employee was amended to reduce the requisite number of employees from 25 to 15. 86 Stat. 103, Pub. L. 92-261, § 2. While the legislative history reveals that the number 15 was a compromise figure, there is nothing in the record to indicate a Congressional intent to require that employees report to work on each day that they are included. *See* 92 Cong., 1st Sess., U.S. Code Congressional & Admin. News 1972, pp. 2513-2519.

It is true that the interpretation given to the statute by the district court might sweep into the ambit of the statute a few truly "Mom and Pop" stores, which employ a large number of part-time employees in order to keep open long hours. The burden on such businesses, however, is the relatively modest one of forbearance from discrimination in employment. In our opinion, the inclusion of such stores offends less against the policy of the statute than does the exclusion of businesses such as the appellant.[1]

In short, we find no basis in authority, canons of statutory interpretation, legislative history or public policy to support the appellant's position.

Accordingly, the judgment of the District Court is *affirmed*.

---

[1] We note that both the Third and Sixth Circuits have adopted a broad reading of "employee" in another context in order to effect the remedial purpose of the statute. *Equal Employment Opportunity Commission* v. *Zippo Manufacturing Co.*, ___ F.2d ___ (3d Cir. 1983) 52 L.W. 2089; *Armbruster* v. *Quinn*, ___ F.2d ___ (6th Cir. 1983) 52 L.W. 2056.

Appendix F.

United States Court of Appeals for the First Circuit

No. 83-1024

VIRGINIA THURBER,
PLAINTIFF, APPELLEE,

v.

JACK REILLY'S, INC., d/b/a JACK'S,
DEFENDANT, APPELLANT.

BEFORE COFFIN & BREYER, *Circuit Judges*,
and SKINNER*, *District Judge*.

ORDER OF COURT

Entered October 14, 1983

Upon consideration of appellant's "Petition for Rehearing",
It is ordered that the "Petition for Rehearing" be, and the same hereby is, denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

---

*Of the District of Massachusetts, sitting by designation.

Appendix G.

Count by Primary Only

RANGE BY EMPLOYEES HERE

DESCRIPTION	0-4	5-9	10-14	15-19	20-49	50-99	100 +	NOT SHOWN	TOTAL
1-9 agri, forrest, fish	87,285 69%	22,761 18%	6,683 5%	2,470 2%	4,254 3%	1,141 1%	766 1%	1,976 2%	127,336
10-14 mining	21,476 46%	9,119 20%	4,265 9%	2,142 5%	4,964 11%	1,723 4%	1,951 4%	928 2%	46,568
15-17 contract const	439,702 69%	100,811 16%	35,485 6%	15,153 2%	29,163 5%	7,998 1%	4,837 1%	7,032 1%	640,181
20-39 manufac-turing	154,903 34%	87,564 19%	43,593 10%	23,699 5%	63,675 14%	30,544 7%	40,459 9%	12,494 3%	456,931
40-49 trans. comm, util	88,259 46%	40,065 21%	18,035 9%	9,013 5%	19,573 10%	6,852 4%	6,478 3%	4,837 3%	193,112
50-51 wholesale trade	261,628 50%	126,661 24%	49,029 9%	22,669 4%	40,605 8%	9,767 2%	5,199 1%	11,420 2%	526,978
52-59 retail trade	822,497 59%	302,802 22%	94,034 7%	41,355 3%	79,442 6%	20,258 1%	8,829 1%	20,844 1%	1390,061
60-69 finance, ins & R	209,132 52%	65,884 17%	24,269 6%	11,244 3%	23,051 6%	7,236 2%	6,351 2%	51,303 13%	398,470
70-89 services	627,911 54%	212,852 18%	79,076 7%	39,570 3%	85,248 7%	30,199 3%	29,183 3%	50,460 4%	1154,499
grand totals	2712,793 55%	968,519 20%	354,469 7%	167,315 3%	349,975 7%	115,718 2%	104,053 2%	161,294 3%	4934,136

No. 83-1066

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JACK REILLY'S, INC., D/B/A JACK'S,
PETITIONER,

v.

VIRGINIA THURBER,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

H. DIANA HICKS,*
PHILIP M. WEINBERG,
GELLER & WEINBERG,
One Hundred Boylston Street,
Suite 900,
Boston, Massachusetts 02116.
(617) 482-5200

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

A. Whether the definition of "employer" in Title VII of the Civil Rights Act of 1964 includes a corporation who employs fifteen regular part time employees although each employee is not required to report for work every working day.

B. Whether the district court properly exercised its pendent jurisdiction authority to ajudicate an identical cause of action arising under the state anti-discrimination statute.

Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES.

MISCELLANEOUS.

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

JACK REILLY'S, INC., D/B/A JACK'S,
PETITIONER,

v.

VIRGINIA THURBER,
RESPONDENT.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of Case.

Respondent adopts, for the most part, the statement of the case presented by the petitioner. The respondent directs the Court's attention to certain omissions contained in petitioner's statement.

During the period of respondent's employment the petitioner's place of business was open 16 hours per day, seven days a week. The petitioner employed a regular full and part-time staff of 15 or more employees, who worked a substantial majority of the weeks in each calendar year and were paid a Christmas bonus by the petitioner. The employees were neither seasonal nor temporary workers. It was the respondent's full time employment. She was not a student. (Petition, Appendix at 24a; Court of Appeals Appendix, at 16-18, 29-30, 39.)

The petitioner openly discriminated against the respondent by repeatedly refusing to promote her to the higher paying job of bartender, despite her superior qualifications and seniority. (Petition, Appendix 14a.) When respondent continued to press her request for promotion the petitioner constructively discharged her by altering and reducing her work hours. (Petition, Appendix 14a.)

The petitioner also neglected to state that a finding in respondent's favor was entered by the District Court on Count II of her amended complaint charging a violation of Massachusetts General Laws, c. 151B *et seq.* (Petition, Appendix 13a-14a.) Chapter 151B is the state counterpart of Title VII, prohibiting discrimination in the terms and conditions of employment based on the gender of the employee. Jurisdiction of the state claim was asserted under the pendent jurisdiction doctrine.

The issue of the propriety of the district court's assertion of pendent jurisdiction was briefed and argued by both parties before the Court of Appeals. Finding in favor of the respondent on the federal claim, the Court of Appeal's opinion did not discuss the state claim contentions.

Summary of Argument.

Regular part-time employees have been included in establishing the jurisdictional threshold of Title VII coverage by every district and appellate court which has passed on this issue since 1975 (p. 4). This unanimous judicial opinion is unequivocally supported by the language of the statute, administrative rulings, and the legislative sources of Title VII which were adopted from other remedial acts encompassing part-time workers within their coverage (pp. 4-8).

The First Circuit's opinion will not lead to increased litigation on the jurisdictional issue (pp. 8-9).

Adoption of the petitioner's interpretation would be patently inconsistent with Congressional policy and Title VII's intent to eliminate gender based discrimination in employment, and would encourage employers to manipulate work schedules to avoid the Act's prohibitions (pp. 9-11).

It would be inappropriate to grant the petition as it is mooted by the district court's entry of judgment against the petitioner under a parallel state anti-discrimination statute pursuant to its pendent jurisdiction authority (pp. 11-14).

Argument.

I. The First Circuit Properly Interpreted the Statute to Include Regular Part Time Employees Who did not Report to Work Each Day.

A. *The Opinion of The Court of Appeals is Consistent With All Judicial and Administrative Precedents.*

Respondent's contention that the term "employee" in § 701(b) of Title VII, 42 U.S.C. § 2000(e)(b), includes only persons "at work" each day has been rejected by every court which has considered it. See, *Armbruster* v. *Quinn*, 498 F.Supp. 858, 861 (E.D. Michigan, N.D., 1980) rev'd on other grounds 711 F.2d 1332, 1334 (6th Cir. 1983); *Hornick* v. *Borough of Duryea*, 507 F.Supp. 1091, 1097 (M.D.Pa. 1980), *Pedreyra* v. *Cornell Prescription Pharmacies*, 465 F.Supp. 936, 941 (D.Colo. 1979), *Pascutoi* v. *Washburn-McReavy Mortuary*, 11 F.E.P. 1325 (D.Minn. 1975). See also, *Dumas* v. *Town of Mount Vernon, Ala.*, 612 F.2d 974, 929 n.7 (5th Cir. 1980); *Stratton* v. *Drumm*, 445 F.Supp. 1305, 1312 (D.Conn. 1978). The First Circuit's decision thus reflected unanimous judicial opinion when it stated that there was "no basis in authority, canons of statutory interpretation, legislative history or public policy to support the [petitioner's] position." (Petition Appendix at 26.) The concurrence of judicial opinion is further supported by the opinions of the enforcing administrative agency (E.E.O.C. General Counsel Opinion, October 18, 20, 1966, Fair Employment Practice Manual, 411:54 B.N.A. (1976)) and treatise commentators. Larson, *Employment Discrimination*, § 5.32 (Matthew Bender & Co. 1973).

B. *The Legislative History of Title VII Lends No Support to Petitioner's Construction of the Statute.*

Examination of the Congressional debates preceding enactment of Title VII only serves to further undermine the petitioner's position. After full briefing by the parties below, the First Circuit correctly concluded that "the legislative history generally weighs heavily against the appellant's position." (Petition, Appendix at 25a.) In particular, the court below noted that the definition of "employer" in Title VII was purposefully borrowed from the Unemployment Compensation Act (26 U.S.C. § 3304 (1954)). For nine years prior to enactment of Title VII, the Internal Revenue Service had ruled that the Unemployment Compensation Act included part time employees regardless of whether the employees reported to work each day.[1] Rev. Rule 55-19, Regulation 107, § 403.215 (1955). The Court properly presumed that Congress intended to include the same class of part time workers in defining an "employer" under Title VII as was utilized in similar remedial legislation. *Canon* v. *University of Chicago*, 441 U.S. 677, 694-696 (1979).

No reference to the Congressional debates cited by the petitioner to this Court, or to the courts below, supports its exclusion of regular part time employees from jurisdictional con-

---

[1] It has been recognized that the National Labor Relations Act (29 U.S.C. § 152) was "the model for Title VII's remedial provisions." *Teamsters* v. *United States*, 431 U.S. 324, 366 (1977). Section 152(3) has been interpreted to count regular part time workers for the purpose of establishing the minimum number of employees necessary to invoke the Acts' protection. See, e.g. *Sears, Roebuck & Co.*, 193 NLRB 48, 78 LRRM 1249 (1971) (part timers who worked only four hours per week); *Stockham Valve and Fittings*, 222 NLRB No. 19, 91 LRRM 1263 (1976). The standard utilized in these cases is the regularity of employment, not the employees' actual daily appearance at work. *University of New Haven*, 190 NLRB No. 102, 77 LRRM 1273 (1971) (part time professors); *Dining & Kitchen Administration*, 257 NLRB 46, 107 LRRM 1514 (1981) (students who were employed in student cafeteria).

sideration. The First Circuit succintly concluded its analysis of the legislative history by stating that there was "nothing in the record" to give credence to petitioner's "unsupported assertion" of Congress' intent in inserting the "working day" clause. (Petition, Appendix 25a.)

C. *The Interpretation Adopted by the Court Below Does Not Ignore the Language of the Statute or Violate Canons of Construction.*

The petitioner's interpretation of § 2000e(b) is not supported by the clear language of the statute. Petitioner's misconstruction is derived only after it grafts the words "at work" onto the "each working day" phrase. Had that been the Congressional intent, the Act would simply have defined the term "employee" as a person who reported to work each day. Section 2000e(f) defines an "employee" simply as "an individual employed by an employer," thereby evidencing a legislative desire not to exclude part time employees in determining the Act's jurisdictional limits. Cf., *United States* v. *Turkette*, 452 U.S. 576, 580-581 (1981); on remand 656 F.2d 5 (1st Cir. 1981), wherein the Court held that the term "enterprise" under the RICO ACT (18 U.S.C. § 1961(4)) included both legal and illegal enterprises in light of the absence of any such distinction in the statutory definition.

Grafting additional words into § 2000e(b) is not required in order to give proper effect to literal terms of the provision. The "working day" phrase was inserted to resolve potential jurisdictional ambiguities, but for purposes far different than those suggested by the petitioner. These purposes can best be discerned by considering the effect of deleting the disputed phrase from the provision.

Deletion of the phrase "for each working day" would redefine a Title VII "employer" as one who had 15 or more em-

ployees in each of 20 weeks. One function of the omitted phrase was to clarify the statutory coverage of businesses which operate only during part of a week in each week of the 20 week period. Section 2000e(b), as enacted, includes those part time operators so long as they employ the required number of persons on the days of the week they are open for business. This interpretation of the "working day" phrase was adopted by the Equal Employment Opportunity Commission in a decision holding race-track operators to be employers, as they employed more than twenty-five drivers on the one day during the week their business was operated, race day. Decision No. 71-2088, 3 F.E.P. 1104, 1105 (1971) (pre-1972 amendment under which 25 was the minimum number of employees).

The deleted definition above would create further ambiguites in the Act's coverage of businesses compelled to hire temporary employees for limited terms or purposes. The "for each working day" language imports a continuity requirement in the employment relationship before Title VII jurisdiction can be asserted. The phrase thus operates in a balanced manner, excluding from consideration proprietors hiring temporary substitute workers, while including those, like the petitioner, who rely on numerous regular part time employees to meet the consistent demands of their business activities.[2] Compare, *Takeall* v. *Werd, Inc.*, 23 F.E.P. 947, 948 (M.D.Fla. 1979) (excluding temporary workers hired to fill in for vacationing employees) with cases cited *infra* at 3.

The lower court's construction, which foregoes Title VII jurisdiction in response to temporary increases in an employer's workforce, yields significantly different results than petitioner's proposal to exclude employers who have a regular

---

[2] The Court below found: "*In order to remain open seven days a week*, Jack's maintained more than 15 employees on the payroll. . ." (emphasis added). (Petition, Appendix at 24a.)

workforce of 15 or more employees even though, by employer preference or job structure, each worker does not report to work every day. The interpretation adopted by the First Circuit gives effect to all the words of the section without excluding a significant part[3] of the national workforce from the protection of the most significant federal anti-discrimination legislation ever enacted.

D. *The Lower Court's Ruling Will Not Have a Negative Impact on the Judicial Docket or Small Business Employment Practices.*

The petitioner's suggestion that the First Circuit's opinion leaves employers with a confused jurisdictional standard resulting in unnecessary litigation and crowded dockets cannot be seriously entertained. Since the 1975 decision in *Pascutoi* v. *Washburn-McReavy Mortuary*, *supra*, only two other federal district courts have been called on to consider the issue, and only in the case at bar has an employer pursued any appeal. Respondent's counsel, in effect, conceded below that the issue was "cut and dried" against them. (Opposition, Appendix 2a.)

Employers will have no problem in determining which employees are regular part time employees and which are temporary workers hired only to fill in on an infrequent basis. It must be assumed that employers have been making that distinction, pursuant to compliance with the Unemployment Compensation Act, for over two decades prior to the First Circuit's decision in this matter. Moreover, the opinion below

---

[3] Almost one-half of the workforce are women, who also comprise approximately 65% of the total number of part time workers nationwide. Employment and Earnings Bulletin, April 1983, United States Department of Labor, Bureau of Labor Statistics, at page 45, Table 29.

specifically differentiates between regular part time employees and "occasional help" hired for "isolated" days. (Petition, Appendix at 25a.)

The proposition that businesses will cut part time workers from payrolls in order to avoid the effect of the First Circuit's opinion cannot stand up to even cursory scrutiny. Employers hire regular part time workers for economic reasons. As the petitioner in this case, they may run their operations on seven-day, double-shift schedules which could not possibly be filled by full time employees on a regular basis.[4] "Requiring each [employee] to work an extraordinary amount of hours per week"[5] is a facetious suggestion since state and federal employment laws and union contracts make such overtime voluntary, compensable at rates which would make it uneconomic, and illegal where health and safety factors are concerned. The only effect of the decision below on employment relations will be to continue to insure that part time workers are not victims of discrimination.

E. *Considerations of Public Policy and Concern for the Effective Enforcement of the Act Compel Adoption of the Opinion Below.*

The Supreme Court has ruled in cases arising under the National Labor Relations Act[6] and the Social Security Act[7] that the term "employee" when used in social and labor legislation

---

[4] The petitioner's assertion that it could have replaced its part time employees with a full time staff who would have worked "every shift, every day" (Petition at 8) is a human impossibility given the seven day per week, 16 hour per day schedule under which it chose to conduct business. The petitioner's hiring of part time workers was not an altruistic decision to benefit college students, but rather an economic one predicated on its operation schedule.

[5] Petition at 8.

[6] 29 U.S.C. § 151 *et seq.*

[7] 42 U.S.C. § 1104 *et seq.*

should be interpretated primarily in light of the remedial purpose intended to be achieved under the statute. *Board* v. *Hearst Publications*, 322 U.S. 111, 124 (1944), *United States* v. *Silk*, 331 U.S. 704, 715 (1947). Similar expressions of the necessity to construe Title VII consistently with its remedial purpose have also been set forth on many occasions. See, e.g. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398-399, (1982). In a different context, two other circuit courts have adopted an interpretation of the term "employee" in § 2000e(b) to effect the remedial purpose of the Act. *E.E.O.C.* v. *Zippo Mfg. Co.*, 713 F.2d 32, 36-37 (3d Cir. 1983); *Armbruster* v. *Quinn*, 711 F.2d 1332, 1336-1337 (6th Cir. 1983). The Court in *Armbruster* noted with approval the district court's inclusion of part time employees in determining the jurisdictional threshold. *Id.* at 1334.

The inclusive definition of "employee" adopted by the lower Court is consistent with this line of authority effectuating the legislative intent to prohibit discrimination in employment. The decision below extends Title VII protection not only to part time employees but also to their full time co-workers. The petitioner's interpretation of the statute contradicts Congress' concern to provide protection for the potential victims of discrimination. Large and medium sized employers might easily take advantage of loopholes created by the petitioner's argument, thereby totally avoiding Title VII's prohibitions.

As an example, the revocation of laws prohibiting retail stores from operating on Sunday[8] has encouraged many businesses to operate on a limited basis for seven days per week. An employer with a six day work force of 30 persons per day who opened on Sunday with a reduced workforce of 14 employees could adopt the petitioner's logic and discriminate against all

---

[8] See, e.g. M.G.L. c. 136, § 6, c. 556 Acts of 1982.

employees free from Title VII's restrictions. Employers with a large workforce might reduce their staff to 14 people for only one day in each of 20 weeks, claiming the requisite minimum number of persons were not on the job site for each day of the statutory period.

To permit such results would encourage employers to manipulate their work shifts with the express purpose of evading Title VII coverage. It would also engender a pattern of non-uniform enforcement, varying according to state work laws and employer preferences. The consequences described in these two simple examples are manifestly inconsistent with the statutory intent and effective enforcement of the Act, and their absurd results must be rejected. *U.S. v. Amer. Trucking Assn's*, 310 U.S. 534 (1940); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

In light of the undisputed remedial intent of the Act and the enforcement difficulties engendered by petitioner's position, it was correct for the First Circuit to adopt an interpretation which included regular part time employees in the jurisdictional determination. The Court recognized that its holding might on rare occasion effect a truly small business. Where, however, the minor burden placed on a subject business is only to avoid discriminatory employment practices, the opinion struck a proper balance in favor of the well established inclusive definition. (Petition, Appendix at 26a.)

II. Allowance of the Petition Would be Improvident as the Decision Below Rests on a Pendent State Claim Which Would not be Disturbed by this Court's Dismissal of the Title VII Cause of Action.

The respondent's complaints of gender based discrimination was tried in the district court pursuant to claims arising both

under Title VII and the parallel state anti discrimination statute, M.G.L. c. 151B. (Petition Appendix 13a, 14a.) The only relevant distinction between these complimentary Acts is the state statute's jurisdictional requirement of a minimum of six employees[9] as compared to the federal minimum of 15 employees. Even accepting petitioner's "at work" test, it concedes it employed a minimum of seven employees each day during respondent's term of employment. (Petition at 3.)

The district court adjudicated and entered judgment in respondent's favor on the state claim in accordance with the proper exercise of its pendent jurisdiction authority. (Petition, Appendix at 13a-14a.) The trial court found there was complete identity of issues under both Acts based on the facts presented at trial. (Petition, Appendix at 15a.)

The petitioner made only a limited argument on the pendent jurisdiction issue to the First Circuit on appeal. The district court's holding that it was appropriate to exercise its discretionary power to adjudicate both interrelated claims was not challenged.[10] Neither did it present any contention that it suffered any actual prejudice in the trial of the combined counts. The petitioner's appellate argument was confined to the proposition that dismissal of the Title VII count on jurisdictional grounds compelled vacation of the pendent claim judgment as it was dependent upon the "insubstantial" federal claim. The First Circuit's affirmation of the Title VII cause of action temporarily mooted the state claim issue.

The First Circuit's opinion must sound the death knell for the petitioner's characterizations of respondent's Title VII claim as "insubstantial." In the context of discussing the sub-

---

[9] M.G.L. c. 151B, § 4(1).

[10] Petitioner conceded that the "common nucleus of operative fact" test of *Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) was met. (Petitioner's Brief, Court of Appeals, at 25.)

stantiality of a constitutional claim necessary to justify pendent jurisdiction this Court has provided a controlling standard:

> claims are constitutionally insubstantial only if the prior dec ions inescapably render the claims frivolous; prev decisions that merely render claims of doubtful or q ionable merit do not render them insubstantial. . . .

Hagans v. *Lavine*, 415 U.S. 528, 537-538 (1974). It is appropriate to apply that same standard to evaluate the substantiality of federal statutory claims to which a pendent state cause of action is bound. *Jackson* v. *Stinchcomb*, 635 F.2d 462, 471, (5th Cir. 1981); *Tedford* v. *Massachusetts Housing Finance Agency*, 522 F.Supp. 508, 510 (D.Mass. 1981), aff'd without opinion, 676 F.2d 682 (1st Cir. 1982). The legislative, judicial and administrative authority presented to the courts below by the respondent fully justified their concluding a substantial federal question was at issue.

Even if the petitioner was ultimately successful in vacating the First Circuit's holding on the Title VII claim, the Court below would be virtually compelled by a pervasive line of authority to affirm the district court's exercise of pendent jurisdiction. See, *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933); *Strachman* v. *Palmer*, 177 F.2d 427, 430-433 (1st Cir. 1949); *Telechron, Inc.* v. *Parissi*, 197 F.2d 757, 762-763 (2d Cir. 1952) holding that denial of a federal claim *at trial* does not limit the Court from entering final judgment on the merits of the pendent cause of action. The considerations of judicial economy and convenience which justify these holdings have also led a substantial number of courts to uphold the exercise of pendent jurisdiction even where the federal statutory claim has been dismissed *prior to trial*. See, e.g., *Rosado* v. *Wyman*,

397 U.S. 397, 405 (1970), *State of N.D.* v. *Merchants Nat. Bank & Trust Co.*, 634 F.2d 368, 371 (8th Cir. 1980); *Gray* v. *International Ass'n of Heat and F.I. & A.W.; L. No. 51*, 447 F.2d 1118, 1120 (6th Cir. 1971); *Ryan* v. *J. Walter Thompson Company*, 453 F.2d 444, 446 (2d Cir. 1971), cert. denied, 406 U.S. 907 (1972).

The rationale of these precedents must surely apply with even greater force to a case commenced in 1977 and affirmed on appeal in 1983. The lapse of the statute of limitations[11] on the state claim would render a post appellate dismissal of that cause of action patently unjust. See, *Pharo* v. *Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980) holding that expiration of statute of limitation is a "determinative" factor in favor of accepting jurisdiction of a pendent claim. See also, *O'Brien* v. *Continental Illinois Nat. Bank & Trust*, 593 F.2d 54 (7th Cir. 1979). The petitioner's failure to appeal any finding of fact or conclusion of law, except subject matter jurisdiction, demonstrates the meritorious substance of the respondent's complaint of discriminatory treatment. Dismissal of her claims at this date would deny respondent the relief due her and render years of good faith litigation futile.

---

[11] M.G.L. c. 151B, § 9 establishes a two year statute of limitation.

Conclusion.

For the reasons stated above, the petition for the writ of certiorari should be denied.

Respectfully submitted,

H. DIANA HICKS,*
PHILIP M. WEINBERG,
GELLER & WEINBERG,
One Hundred Boylston Street,
Suite 900,
Boston, Massachusetts 02116.
(617) 482-5200

Counsel of Record

Appendix A

United States Court of Appeals For the First Circuit

No. 83-1024

VIRGINIA THURBER,
PLAINTIFF, APPELLEE,

v.

JACK REILLY'S, INC.,
D/B/A JACK'S,
DEFENDANT, APPELLANT.

Before
Coffin and Breyer, *Circuit Judges*,
and Skinner,* *District Judge*.

ORDER ON APPLICATION FOR FEE

Entered December 15, 1983

The successful plaintiff-appellee seeks an award of counsel fees under 42 U.S.C. § 2000(e)-5(k). Counsel has submitted a request for $6,885. representing 76.5 hours of work on the appeal at the rate of $90 per hour. The hourly rate is eminently reasonable in view of the skill and experience demonstrated by appellee's attorney in this case. We adopt it as the appropriate "lodestar". His 76.5 hours have been adequately accounted for.

* Of the District of Massachusetts, sitting by designation.

Appellant suggests that counsel's fee should be reduced because the issue was cut and dried, and all the precedents favored the appellee. If appellant concedes this point, we are unable to repress the suspicion that appellant put the appellee through the needless expense and effort of defending a frivolous appeal. Consequently, its attacks on counsel's billing procedure do not engage our sympathy.

The appellee shall be awarded her counsel fees in the amount of $6,885 plus $927 for the time spent on her reply brief and counsel's supplemental affidavit for a total award of $7,812.

So ordered.

By the Court,

Francis P. Scigliano
Clerk.

[Cert. cc: Clerk, U.S.D.C., Massachusetts, cc: Messrs. McNeill & Weinberg.]